

AUG 12 2003

**NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

MARK BIRDINE,

Petitioner,

v.

SUSAN HUBBARD, Warden,

Respondent.

No. 00-17023

D.C. No. CV-99-00637-MJJ

**ORDER AMENDING
MEMORANDUM
DISPOSITION**

Before: SCHROEDER, Chief Judge, B. FLETCHER, and KOZINSKI, Circuit Judges.

The memorandum of this court filed April 9, 2002, 43 Fed.Appx. 85, is amended as follows:

On page 86-87, delete the penultimate paragraph of the memorandum, which begins with the sentence, "Here we do not have information about the available pool or any other circumstances suggesting bias." Replace that paragraph with the following text: "Here we do not have information about the available pool or any other circumstances suggesting bias. Birdine relies on a statistical showing to establish his prima facie case, but he does not succeed because he has not demonstrated that the number of African-Americans struck was disproportionate to the number in the jury pool."

On page 87, delete the final paragraph of the memorandum, which reads as follows: “Because we find that no prima facie case was established, there is no need to look to the jury questionnaires, and thus, no merit to the defense’s contention that their disappearance, for reasons unknown, requires us to vacate the conviction.” Replace that paragraph with the following text: “The defense relied on one questionnaire (Ms. Cowan’s) to establish its prima facie case, and that questionnaire was preserved. Because the defense chose not to rely on the now-missing questionnaires when it attempted to make its prima facie case, it has not demonstrated prejudice as a result of their later loss. Accordingly, there is no merit to the defense’s contention that their disappearance requires us to vacate the conviction.”

Except insofar as the April 9, 2002, memorandum has been modified, the petition for rehearing and the petition for rehearing en banc are denied.